

# **WISCONSIN LEGISLATIVE COUNCIL STAFF**

## ***RULES CLEARINGHOUSE***

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## **CLEARINGHOUSE RULE 98-049**

### **Comments**

**[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated October 1994.]**

#### **1. Statutory Authority**

The commission should review whether it has the authority to delegate to the Technology for Educational Achievement in Wisconsin Board the duty to establish technical standards and specifications under s. PSC 161.03 (1) and (2) and the powers to establish other eligibility and priority criteria under s. PSC 161.06 (2) (f) and (3) (f). Section 196.218 (4) (c) 2. and 3., Stats., direct the commission to establish these eligibility requirements and specifications for access to a data line or video link.

#### **2. Form, Style and Placement in Administrative Code**

a. The use of hyphens in the reference to statutes interpreted in the analysis accompanying the rule does not conform with preferred drafting style. [See s. 1.07 (2), Manual.]

b. The inclusion of “Section” before “PSC” in the treatment clauses in SECTIONS 1 to 3 does not conform with preferred drafting style. [See the examples in s. 1.04 (2), Manual.]

c. The treatment of s. PSC 160.05 should be divided into three SECTIONS with each SECTION corresponding to a specific type of treatment. One SECTION should amend s. PSC 160.05 (intro.), a second SECTION should renumber s. PSC 160.05 (1) to (10) to sub. (1) (a) to (j) and a third SECTION should create s. PSC 160.05 (2) to (4). [See s. 1.04 (2) (b), Manual.] Similarly, the treatment of s. PSC 160.17 by the rule should be divided into appropriate SECTIONS.

d. The reference at the end of s. PSC 160.17 (2), as created by the rule, should include “PSC” before “160.05 (2).”

e. The use of parentheses to contain parenthetical or explanatory material is not the preferred drafting style. [See s. 1.01 (6), Manual.] See the use of parentheses in s. PSC 161.05 (3).

f. The rule uses “will” as part of the verb in ss. PSC 161.06 (4) and 161.07 (1). The preferred drafting style to express a mandatory duty is to use “shall” as part of the verb. To express a discretionary authority, the preferred drafting style is to use “may” as part of the verb. [See s. 1.01 (2), Manual.] The commission should replace “will” in these two provisions with “may” or “shall” as appropriate.

g. Since the Educational Telecommunications Access Program established under s. 196.218 (4r), Stats., does not include the payment for telecommunications services under s. 16.973 (1), Stats., to the campuses of the University of Wisconsin System at River Falls, Stout, Superior and Whitewater, the text of s. PSC 161.08 (3) should not be placed in ch. PSC 161, as ch. PSC 161 relates to the Educational Telecommunications Access Program.

h. Unless the commission has a specific reason not to, the commission should be consistent in its treatment of terms that are defined in the statutes in the definitions in s. PSC 161.02. The definitions of “data line” and “private college” in s. PSC 161.02 (4) and (6) essentially repeat the definitions in s. 196.218 (4r) (a) 1. and 2., whereas the definitions of “private school” and “school district” in s. PSC 161.02 (7) and (9) cross-reference statutory definitions.

#### **4. Adequacy of References to Related Statutes, Rules and Forms**

a. Since an agency may only interpret a statute that it enforces or administers, the appropriateness of including statutes that the commission does not administer or enforce, ss. 16.974 (7), 20.275, 20.285 (1q), 44.70 and 44.71, Stats., in the list of statutes interpreted in the analysis accompanying the rule is not apparent.

b. The list of statutes interpreted in the analysis accompanying the rule indicates that the rule interprets s. 196.218 (3) (a) 4. and (f), Stats. Since the rule does not appear to contain any provisions which interpret these statutes, the necessity for listing them is not apparent.

c. Section PSC 161.05 (5) refers to a form. The commission should ensure that the requirements of s. 227.14 (3), Stats., are met.

d. In s. PSC 161.08 (3), it appears that the cross-reference to s. 16.973 (1), Stats., is incorrect. Following the enactment of 1997 Wisconsin Act 27, this provision of the statutes only contains definitions.

#### **5. Clarity, Grammar, Punctuation and Use of Plain Language**

a. The second sentence in s. PSC 160.17 (3) gives the impression that the commission may unilaterally modify the rate of assessments that fund the universal service fund at any time

based on changes in funding needs. The assessments are capped under s. 196.218 (3) (a) 3., Stats., at a rate sufficient to generate the amounts in the specified appropriations. If the funding needs determined by the commission exceed the sum of those appropriations, then the commission may change the assessments that fund the universal service fund only following a change in one or more of the appropriations through enactment of a law or a supplemental appropriation authorized by the Joint Committee on Finance under s. 13.101 (3), Stats. The commission should clarify s. PSC 160.17 (3) to establish that the assessments may not raise more funds than what is authorized to be appropriated under ch. 20, Stats.

b. Section PSC 161.01 (2) authorizes a school district, private school technical college district, private college or private library board to receive special access to a data line or video link in a manner that does not conform with ch. PSC 161 under an exceptional or unusual situation. Since sub. (2) is written in the passive voice, the process that one of these entities should follow to receive this treatment is not clear. Should the entity apply to the commission, the Department of Administration (DOA) or the Technology for Educational Achievement in Wisconsin Board for this treatment? And what standards will be used?

c. Section 196.218 (4r) (c) 5., Stats., requires the rule to include the privacy protections specified in s. 196.209 (4) (a) and (b), Stats. The text of the privacy protections in s. PSC 161.04 is identical to the general protections specified in s. 196.209 (4) (a) and (b), Stats. Can the commission provide additional guidance in s. PSC 161.04 on the types or characteristics of protections that satisfy these requirements to help ensure a consistent application of the requirements? The rule as written says nothing.

d. As drafted, the restriction in s. PSC 161.05 (3) on dual funding applies only to a school district that has the specified grant because of an access contract with the DOA under s. 16.974 (7) (a), Stats., in effect on October 14, 1997. If the commission intends this restriction to apply to all school districts that have received a grant under s. 196.218 (4r) (g), Stats., in the current state fiscal year, then the commission should delete the clause at the end of s. PSC 161.05 (3) that begins with “because” and ends with “link” before the last period in the subsection.

e. The eligibility criteria in s. PSC 161.06 (2) (b) and (d) refer to an applicant’s technology plan and training plan. What are these plans? They are not identified or referenced elsewhere in ch. PSC 161. If they are required of all applicants, then the rule should identify them in the requirements for an application in s. PSC 161.05.

f. The commission should review the eligibility criteria in s. PSC 161.06 (2) and the criteria for prioritizing applications in s. PSC 161.06 (3) to ensure that the application of each criterion is clear. For example, what does the criterion in sub. (2) (b), “applicant’s technology plan,” mean? Must an application have any technology plan or a plan with specific content to meet this criterion? The criterion in sub. (2) (e), “proposed uses of the requested access,” suggests that some uses are more acceptable than others and that the uses will be a factor in determining whether an application for access is granted. With respect to the criterion in sub. (3) (b), “whether the applicant has applied for a discount under the Federal Universal Service Program and 47 U.S.C. 254,” it is not clear if application for this federal discount would assist or hinder an application.

g. Under s. PSC 161.07 (2), the Technology for Educational Achievement in Wisconsin Board may coordinate with the DOA an investigation of the feasibility of alternative access and, if alternative access is feasible, coordinate with the department for the procurement of such alternative access. Can the commission clarify this process by establishing criteria for conditions that will make an alternative access “feasible”?

h. What is the contract between an applicant and the DOA referred to in s. PSC 161.08 (1)? The commission should define it or provide a reference to a statute or administrative rule that requires it.

i. The provisions in s. PSC 161.08 (2) and (3) essentially repeat the provisions in s. PSC 160.05 (2) to (4). Also, s. PSC 161.09 is redundant with the provisions in s. PSC 160.17 (2) and (3). The commission should review ss. PSC 161.08 (2) and (3) and 161.09 to determine whether they are necessary as part of ch. PSC 161.